BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

[redacted] and

Petitioners,

vs.

KNOX COUNTY BOARD OF EDUCATION,

Respondent.

Case No. 99-67

ALJ: HON. KEVIN S. KEY

COVER SHEET

This Cover Sheet serves to identify all parties by name because the body of this decision will not contain names for confidentiality and privacy of those individuals involved. These persons are identified along with the name used in the body of the decision. [redacted]. "parent" or "father"; [redacted] "student " or "child"; Knox County Board of Education - "LEA" or "School System"; Dogwood School "local school" or "school of zone"; St. Joseph Elementary - "parochial school"; Helen Ross McNabb Mental Health Agency - "local mental health agency".

DATED: August 1st, 2000

FINAL DECISION

Procedural History

This matter arose as a request for a due process hearing on or about October 28, 1999, by the parent. It was assigned to this Administrative Law Judge on November 16, 1999. A Pre-Conference Order was issued on November 17, 1999 requesting that within one week certain documents be produced by the LEA and requiring the parties to set up a telephonic pre-hearing conference in order to delineate issues and expedite this matter. No conference was scheduled and on or about December 17, 1999 the Parent obtained the services of the local Legal Aid Society to represent him in this matter. On January 14, 2000 the Legal Aid Society's paralegal wrote the school system requesting an extension of 30 days before continuing with discovery and holding a conference call in order to "implement efforts to reach a settlement". The ALJ contacted the school system and the paralegal for the Legal Aid Society encouraging potential settlement but requiring the parties to develop a joint scheduling order to allow adequate time for discovery by February 11, 2000. The attorney for the Legal Aid Society sent a letter to the school system setting forth on February 10, 2000 certain demands for a joint discovery order and included waiver of the 45-day Rule. The school system's attorney responded on February 15, 2000 and no joint scheduling order was entered. Because of the problems the Legal Aid Society had in contacting the father no conference call could be scheduled.

Finally, the Administrative Law Judge, sua sponte, issued a scheduling order on March 22, 2000 and set this matter for Due Process hearing on May 17, 2000 at 9:00 a.m. with corresponding discovery and deadlines on April 11, 2000. A different

attorney for the local Legal Aid Society sent a letter and a Notice of Non-Suit Without Prejudice and a Motion To Withdraw As Counsel to this Administrative Law Judge, apparently because of difficulties in communicating with the parent. (The original Legal Aid attorney had withdrawn from employment at Legal Aid because of family health problems.) When the parent received a copy of this dismissal he requested that the local Legal Aid Society withdraw the request for non-suit and he dismissed the local Legal Aid Society as counsel. Based on the matters before the Administrative Law Judge the parent was allowed to withdraw the Motion for Dismissal and after an opportunity for the parent to obtain substitute counsel, the local Legal Aid Society was allowed to withdraw as counsel for the parent.

The parent was given until April 28,2000 to obtain substitute counsel and to respond certain outstanding discovery provided by the school system. The father complied with discovery requests but represented himself for the remainder of the due process hearing request.

After a conference call on May 19, 2000 this matter was set for Due Process hearing on June 26 and 27, 2000 beginning at 9:00 a.m. each day. This ALJ advised the parent, if necessary, to request subpoenas for key witnesses if needed. The parties were directed to jointly develop a single list of documents, with which the parties timely complied. No subpoenas were ever requested.

On Monday, June 19, 2000, the parent contacted the Administrative Law Judge wanting a continuance of the case. The Administrative Law Judge attempted to contact the school system's attorney who was unavailable. I sought to either discuss the matter jointly then or set a time convenient for all. A time for a conference call was finally set for Thursday, June 22, 2000 at 3:00 p.m. (CDT) at which time the parent had earlier

indicated he would be available. A call was made and the parent was not then available.

The Administrative Law Judge contacted the parent that night at home at 10:30 p.m. to ascertain the status of the motion to continue and the parent indicated that he would withdraw the motion to continue and would go through the motions of the hearing the next Monday as a pre-condition for a federal court lawsuit.

On June 26, 2000 the school system was present but the parent appeared with the student approximately 20 minutes late and gave a short, two-minute statement, demanding why not all witnesses on the witness list were available and then left with his son. The due process hearing was not dismissed by the parent. The hearing was held with the school system's witnesses based upon the issues before the Administrative Law Judge on June 26th , 2000.

Facts

The student was born March 25, 1990. His mother died within a few months of his birth and the child has been raised by his father since then.

The child entered kindergarten in the school of zone and the LEA on October 30, 1995 (transcript, p. 16).

During this time he made satisfactory progress in both kindergarten and first grade (transcript pp. 39-41). The student did exhibit some behavior problems and a behavior plan was developed for the student as a regular education student (transcript, p. 47).

Apparently, the principal contacted the parent concerning these behavior problems and recommended intervention by a local mental health agency. (transcript p. 50) Initially the parent was receptive but then rejected any such assistance. During

the first grade year there were apparently other incidents and statements between the parent and the principal of the school of zone. The school believed the child was making progress in regular education(transcript pp. 38-43).

On March 3, 1997 the father withdrew the student from the LEA and placed him in a local parochial school and the next school year the student repeated first grade in the parochial school. In May, 1998 the parent had a private psychological examiner and licensed psychologist conduct a confidential psychological report (Record p. 162 and 169). This psychological report stated that the student's pattern of scores met state criteria for identification as learning disabled based upon discrepancies in reading, math and written expression. The psychologist further recommended the development of an IEP which would incorporate certain modifications to regular education. The report also stated that the student exhibited symptoms of ADHD (transcript pp. 173-174). Apparently based on this report the parochial school developed an IEP which provided for additional services at the rate of one-half hour per day.

The student continued in parochial school until re-enrolled in the LEA on August 18, 1999 (transcript p. 19). On that date an IEP was developed with the assistance of the staff of the local parochial school (transcript p. 24). The parent had no objection to the substance of the IEP (transcript p. 22). The parent perceived the school of zone as a "poison pill" because of his perception of the staff of the school of zone (transcript p. 31). He apparently thought the staff was abusive (transcript p. 31).

While alternative placements were explored the IEP was provided through homebound services with the consent of the parent. The father was advised of his rights.

In a later meeting, the Director of Pupil Personnel for the LEA and the parent contacted the United States Department of Education concerning possible variances from a consent decree entered with the United States Department of Justice concerning racial balances in the school. Apparently the school of zone was a "racially identifiable" school which did not allow the transfer of white students to other schools except to other "racially identifiable" schools which also had a lower than average percentage of white students, except in the case of magnet schools. The parent resisted the other alternative placements, instead wanting other white majority schools. The school system's testimony was that any school could offer the services required by this student, but that the LEA had to comply, if possible, with the desegregation order. (Transcript pp. 57-58). The parent then stated that he would move his residence to the zone of a desired school but apparently never did.

On November 11, 1999 the parent informed the LEA that the student had already returned to the local parochial school. (transcript p. 29). The student remained in the parochial school for the remainder of the school year.

Legal Argument

I. THE PARENT FAILED TO COMPLY WITH FEDERAL REGULATIONS IN ORDER TO OBTAIN REIMBURSEMENT FOR PRIVATE PLACEMENT IN THE PRIVATE SCHOOL

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(I) In general

Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the

child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in (ii) may be reduced or denied - - (I) if - -

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(7) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide such notice if - -

(I) the parent is illiterate and cannot write in English;

(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;

(III) the school prevented the parent from providing such notice; or

(IV) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I).

20 U.S.C. § 1412(a)(10)(C)

The federal regulations almost mirror the statute and provide:

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied - -
(1) If - -

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to

their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide notice if - -

(1) The parent is illiterate and cannot write in English;

(2) Compliance with paragraph (d)(1) of this section would likely result in physical or serious emotional harm to the child;

(3) The school prevented the parent from providing the notice; or

(4) The parents had not received notice pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section.

34 C.F.R. § 300.403(d)(e).

This Administrative Law Judge finds that the record shows that the parent did inform the IEP team that he was rejecting the placement at the school of zone, but there is no showing that he informed the LEA that he intended to enroll his child in the local parochial school at public expense. Instead, the facts in the record show that while the parent did not accept the proposed placement, he accepted services for homebound placement under the IEP and then, several weeks later, unilaterally placed the student back in the local parochial school without notice. Accordingly, reimbursement for the local parochial school must be denied. The Administrative Law Judge finds that the parent was literate, that there was no eminent physical or emotional serious harm to the student, and that the parent received proper notice under his rights under State and Federal Special Education Law. Accordingly, placement in private parochial school should be denied on this ground alone.

II. THE PROPOSED IEP AND PLACEMENT WAS PROPER.

It is undisputed that the IEP in question was developed with the assistance of the school's staff of the parochial school and substantially paralleled the services under that IEP except that greater hours of special services were provided under the LEA IEP in order to ease transition. (transcript p. 21). Based upon the record, while there were incidents between the parent and the school principal during the first grade placement in the school of zone, based upon the record this Administrative Law Judge must conclude that the school of zone could properly implement this IEP. (Transcript pp. 57-58). 34 C.F.R. 300. 552(c) The statements of the principal concerning her prior communications with the parent, while seemingly not offensive, could well have been taken as offensive by the parent. This Administrative Law Judge well knows that the manner and circumstances of a statement are often just as important as the actual substance of the statement in creating an impression. However, the parent chose to forego telling his side of the story, and I can only rule based on the record before me. I can only conclude that these statements were made in a manner meant to be helpful, though the parent may have well disagreed.

Nonetheless, the school system acted in an appropriate manner in seeking alternative neighborhood schools to accommodate the parent. Based on the facts in this record an atmosphere of rancor would have existed between the parent and the school of zone which would have made the education of this student difficult in the school of zone. The parent was open to an alternative placement but did not want the LEA to comply with the mandates of the desegregation order in effect for the LEA. In so far as the special needs of this student are concerned the question is this: can a school system or this Administrative Law Judge ignore the terms of a desegregation

order in order to accommodate the needs of this student? I hold that they can, but rarely, and not in this case.

Special education law and racial desegregation law both flow from the same fountain of justice, the 14th Amendment of the United States Constitution. The special education law arises out of PARC v. Commonwealth of Pennsylvania, 334 F. Supp.. 1257 (1971) and 334 F. Supp. 279 (1972), and Mills v. Board of Education, 348 F. Supp. 866 (1972), which held that under the equal protection and due process clauses of the 14th Amendment of the United States Constitution, students with special education needs were afforded relief under that provision of the Constitution. 20 U.S.C. § 1401 *et seq.* was passed in order to provide standards for the determination of appropriate relief along with federal funding to the states and local education agencies to meet these special education needs.

Racial desegregation arose out of the abolition of the "separate, but equal" doctrine as enunciated by the United States Supreme Court in Brown vs. Board of Education, 98 L.Ed 873 347 U.S. 483; 74 S. Ct. 686 (1954). Brown and its progeny first struck down de jure and later de facto segregation and placed many school systems under orders to assure racial equality in the provision of public education.

The instant LEA, like any other LEA, must be mindful of those considerations in the implementation of all its programs. If the LEA is under a legally mandated desegregation order, then by definition the school of zone would comply with the mandates of both racial desegregation and special education law if the school of zone was the appropriate forum for providing the special education services. If I hold that the school of zone was not the appropriate forum for the provision of these services, the LEA must make every effort to comply with desegregation orders in choosing an appropriate alternative education forum for a special education student. Only if no

other school can provide the special education services could the LEA ignore the desegregation order. This rationale is based upon the belief that the needs of an individual special education student would far outweigh the damage done to the inviolability of the desegregation order.

In the instant case there is no showing that variance from the desegregation order would gain any additional educational benefit to the student. In other words, those schools which were appropriate under the desegregation order are also appropriate alternative educational placements for this student.

Therefore, this Administrative Law Judge finds (1) that the IEP of August 18, 1999 is an appropriate IEP and (2) that the parent failed to follow procedural guidelines in order to obtain relief for private school placement. It is further found that the school of zone is an appropriate education forum for this child but that the alternatives set forth by the LEA are also appropriate in light of the parent's past difficulties with the local school of zone.

IT IS ORDERED this 1st day of August, 2000.

KEVIN S. KEY #9519
Administrative Law Judge
217 Second Avenue North
Nashville, TN 37201
(615) 256-4080

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Final Decision was mailed, first class postage prepaid to [redacted] and Susan Crabtree, Attorney Knox County Law Department, City County Building, Knoxville, TN 37901 on this the 1st day of August, 2000.

KEVIN S. KEY #9519